

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1279

To be argued by
LAWRENCE IASON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1279

UNITED STATES OF AMERICA,

Appellee,

—V.—

ROBERT A. GUBELMAN, SR.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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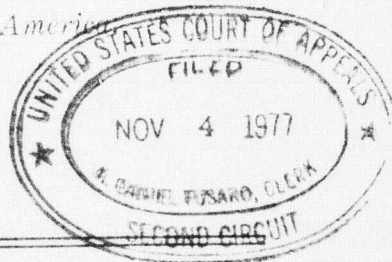


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**United States Court of Appeals
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Docket No. 77-1279

UNITED STATES OF AMERICA,

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—V.—

ROBERT A. GUBELMAN, SR.,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

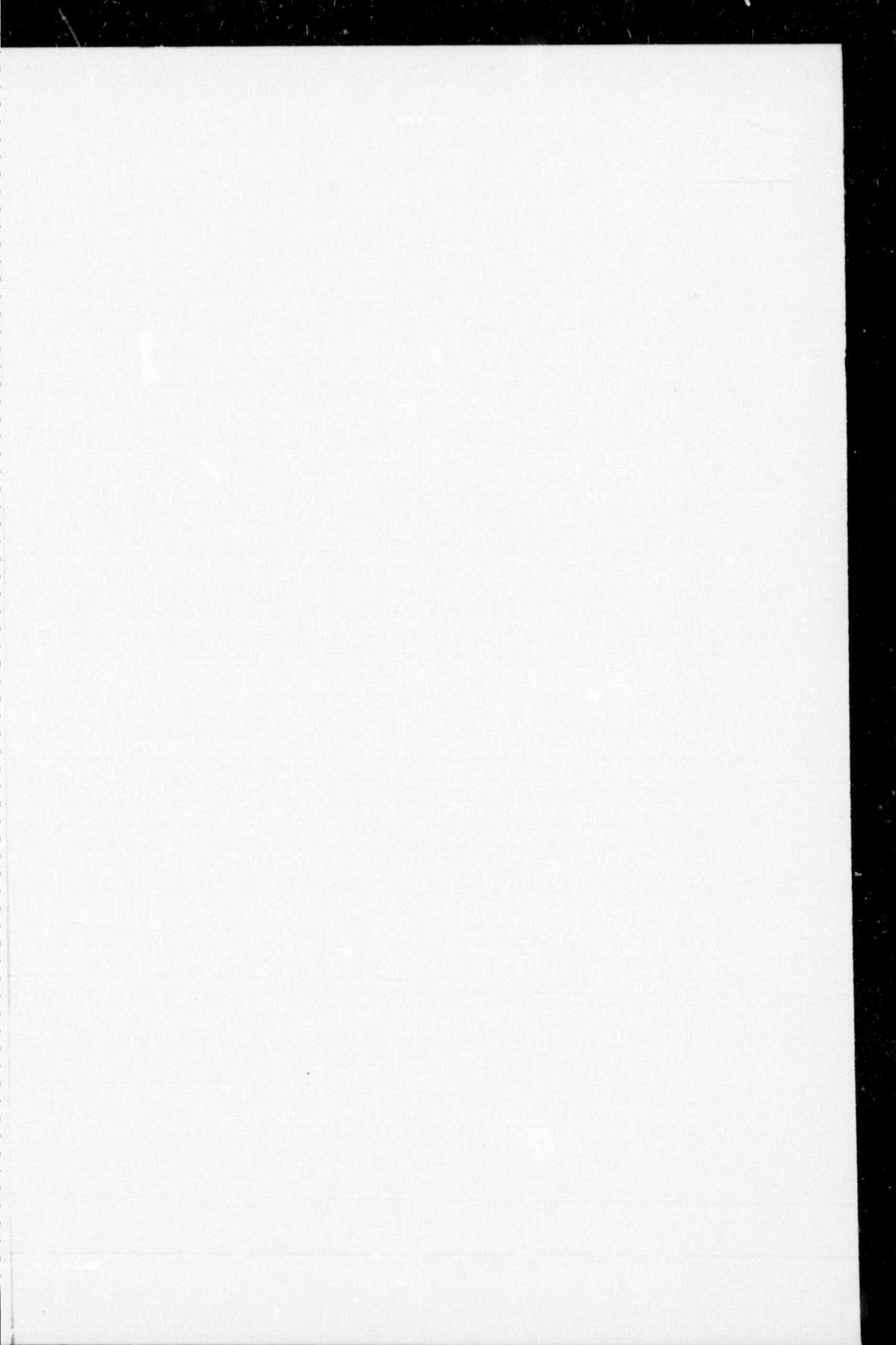
Robert A. Gubelman, Sr., appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on May 11, 1977 after a five day jury trial before the Honorable Irving Ben Cooper.

Indictment 76 Cr. 1041, filed on November 9, 1976, charged that while Gubelman was a federal meat inspector he took money from three meat packing companies which he inspected, in violation of Title 21, United States Code, Section 622.* Superseding Indictment 76 Cr. 1041,

* The relevant portion of Title 21, United States Code, Section 622 provides as follows:

"Any inspector . . . who shall receive or accept from any person, firm or corporation engaged in commerce any gift, money, or other thing of value, given with any pur-

[Footnote continued on following page]



filed on March 10, 1977, was identical to Indictment 76 Cr. 1041 except for some slight changes in dates of the alleged offenses. Both Indictments contained three counts.

The trial began on April 12, 1977, and concluded on April 18, 1977, when the jury found Gubelman guilty as charged.* On May 11, 1977, Judge Cooper sentenced Gubelman to concurrent terms of two years in custody on each count. The Court released Gubelman on his own recognizance pending this appeal.

Statement of Facts

Synopsis

Robert Gubelman was a corrupt federal meat inspector who took approximately 37 bribes from four separate meat companies in a span of two years. Shortly after being assigned to a company, Gubelman would demand pay-offs. If the company showed any reluctance to bribe him, Gubelman extorted the money by making it difficult for the company to operate. On one occasion Gubelman forced a company to close until the owner capitulated to Gubelman's demands for money. Gubelman threatened to close another company for technical viola-

pose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than one thousand dollars nor more than ten thousand dollars and by imprisonment not less than one year nor more than three years."

* At the beginning of the trial the Government moved for a severance as to Count Two. This severance was granted without objection, and the Government presented no evidence on this count. After Gubelman was convicted and sentenced on Counts One and Three, the Government's motion for dismissal of Count Two was granted on May 23, 1977.

tions of complicated sanitary regulations. Once Gubelman was paid off, he left the company alone.

Gubelman simply denied taking the bribes, claiming that all four Government witnesses who testified that they gave money to him were lying. (Tr. 364).*

The Government's Case

As a Federal meat inspector employed by the United States Department of Agriculture, Gubelman was responsible for assuring the cleanliness of meat-packing plants and of the products they sold. Ordinarily, a Federal meat inspector is assigned to four or five plants at a given time. (Tr. 25). At the start of the day, a meat inspector issues the brands used to mark the meat with the Department of Agriculture number assigned to the plant. After issuing the brands, the inspector conducts a sanitary inspection, in which he checks the floors, walls, ceilings and equipment used in the plant. (Tr. 26-27).

Federal meat inspectors have tremendous power over the companies they inspect. As a result of the vagueness and breadth of the sanitary regulations, an inspector has considerable discretion in determining whether a company has violated sanitary regulations. Once an inspector has determined that a regulation has been violated, the inspector may issue a warning, close a portion of the operation or shut down the entire plant. (Tr. 27-28).

One of the companies Gubelman was assigned to inspect was Master Purveyors, a Manhattan plant which sold beef, veal, lamb and pork to various hotels and

* References to the trial transcript will be designated "Tr.", references to Government exhibits will be designated "GX", and references to defense exhibits will be designated "DX".

restaurants. (Tr. 75-78). On Friday of the first week that Gubelman was assigned to Master Purveyors, he approached Sam Solasz, the owner of Master Purveyors, and said, "How about it?" (Tr. 79-80). Solasz refused to give Gubelman any money. As a result, Gubelman came in very late the following Monday, preventing Master Purveyors from shipping any meat because meat could not be shipped until the inspector had issued the company's brands. Gubelman continued to disrupt the business of Master Purveyors on Tuesday, closing the company for two or three hours. On Friday Gubelman approached Solasz and said, "Well, did you decide, did you make up your mind?" This time Solasz gave Gubelman the \$25 he demanded. That following Monday Gubelman arrived early at Master Purveyors and allowed Solasz to open the business. On Friday, when Gubelman again demanded \$25, Solasz gave it to him. (Tr. 81-82).

A few weeks after the payments began, Gubelman noted that Master Purveyors' business had increased, and Gubelman therefore demanded a "raise" to \$50 a week. Having seen what Gubelman would do when his demands were not met, Solasz gave Gubelman the raise. Once the payments began, Solasz paid Gubelman every Friday, and Gubelman let Master Purveyors operate without harassment.* (Tr. 81-82, 94-95, 98).

Gubelman also took money from Plaut & Stern, Inc., a wholesale meat company located in the Bronx.** (Tr. 181-84). On Friday of the first week that he was the inspector at Plaut & Stern, Gubelman approached Harry

* Solasz did not remember the dates when he made payments to Gubelman, but Government Exhibits established that Gubelman was the inspector at Master Purveyors from August 20 to November 25, 1972 and from December 10, 1972 through January 6, 1973. (GX's 5 and 9).

** Gubelman was assigned to Plaut & Stern in 1973, from April 17 through 20, May 1 through 12, September 2 through 15 and November 27 through 30. (GX's 6 and 10).

Langsam, one of the owners of Plaut & Stern, and told Langsam to "pay-off". Langsam gave Gubelman \$20-25 that week and every Friday that Gubelman was the Plaut & Stern inspector. (Tr. 194-95).

The Government also introduced evidence that Gubelman took bribes from two companies not referred to in the Indictment. While Gubelman was assigned to the S.J. Schaffer Company, located in the Bronx, he took \$10 every Friday from Herman Lustgarten, manager of the plant. These pay-offs went on for four months.* (Tr. 242-48).

Gubelman also took bribes from Alfred Rosenman of the Consolidated Beef Company, a meat-boning plant located in Jamaica, Queens.** Until the pay-offs began, Gubelman complained about conditions in the plant. In order to avoid this harassment, Rosenman gave Gubelman \$5 each day Gubelman was assigned to Consolidated Beef. (Tr. 255-56, 260).

Defense Case

Gubelman testified in his own behalf, denying that he took any money or anything of value from Sam Solasz of Master Purveyors, from anyone at Plaut & Stern, from Alfred Rosenman or from Herman Lustgarten.*** (Tr. 336-37, 344, 352, 359-60).

* Gubelman was the inspector at S.J. Schaffer during 1973, on March 28, from May 1 through 11, from September 4 through 14, on October 11 and 12 and from December 19 through 21.

** Gubelman was the inspector at Consolidated Beef on March 25 and from April 29 through May in 1974 and from May 27 through 30, 1975.

*** Gubelman also called three other witnesses whom his counsel called character witnesses, although they did not actually testify either to Gubelman's reputation or to their opinion of his truth-

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After denying that he had ever taken anything of value from any meat-packing company, Gubelman admitted that he had received cigars from Joe Staiman of the Western Meat Company, but claimed that Staiman also had accepted cigars from him. (Tr. 365-66).

Gubelman also admitted receiving a package from Consolidated Beef Company, but claimed it contained not meat, but worthless dog bones. (Tr. 375-76). Before the trial began, the United States Attorney's Office had shown Gubelman a movie of a man placing this package in Gubelman's car. (Tr. 373-74).

Government's Rebuttal Case

Joseph Staiman testified that he gave Gubelman approximately 20 cigars, which cost from eighty cents to a dollar each and denied that Gubelman ever gave him any cigars. (Tr. 385-87).

Thomas St. Pierre, a supervisory special agent with the Office of Investigation of the United States Department of Agriculture, testified that on May 19, 1975 he conducted a surveillance of Gubelman's car in connection with an investigation of pay-offs to meat inspectors.

fulness or honesty. Each of the three witnesses knew Gubelman from his participation in the New York City auxiliary police program. John Howe and Marie Zarzycky are police officers who testified that Gubelman participated in the auxiliary police program. Zarzycky also testified that she "found 'no defect' in the character or the carrying out of duties by this defendant with regard to the community." (Tr. 313-14, 378). Donald Nutter, a friend of the defendant and fellow member of the New York City Auxiliary Police Program, said that he knew of no fault in Gubelman's character. (Tr. 380-81). Finally, Gubelman introduced as a defense exhibit portions of his Department of Agriculture personnel folder, which his attorney offered as evidence of Gubelman's good character. (Tr. 295, DX-O).

After watching someone place two packages in Gubelman's car, St. Pierre saw Gubelman enter the car and drive off. While he was watching, St. Pierre filmed this scene with a movie camera. (Tr. 397-400, GX's 22-24).

ARGUMENT

The District Court Properly Exercised Its Discretion In Admitting The Similar Act Proof.

The only claim Gubelman makes in this appeal is that the District Court committed reversible error by admitting evidence that Gubelman took bribes from two companies not mentioned in the Indictment. Arguing that his intent was not in issue, Gubelman contends that the only purpose served by this testimony was to establish his "proclivity for taking bribes" (Brief at p. 16) and that this proof violated the prohibition against admitting evidence of other crimes solely to show that the defendant was a bad man.

This claim is erroneous. The evidence was admissible to prove Gubelman's pattern of conduct and to contradict his defense of mistaken identity. Gubelman never contended at trial that the impermissible prejudicial impact of the similar act evidence outweighed its probative value, and he has waived that claim on appeal.

This Court has consistently held that evidence of other crimes is admissible "unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm its probative value." *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S.

1091 (1977).^{*} The District Court is granted wide discretion in weighing the probative value of the proffered evidence against its impermissible prejudicial impact, and that discretion will rarely be disturbed on appeal. *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977); *United States v. Rapoport*, 545 F.2d 802, 805 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3634 (March 21, 1977). See also *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc) (the exercise of discretion by the trial judge should be upheld unless he acted "arbitrarily or irrationally.")

The Government proved that during the time period that Gubelman was demanding bribes from the two companies named in the Indictment, he engaged in an identical bribery-extortion scheme with two other meat com-

^{*} We respectfully submit that this Court has repeatedly rejected appeals based on similar act claims because this evidence usually is relevant and because its probative value ordinarily outweighs its prejudicial effect. See, e.g., *United States v. Cavallaro*, 553 F.2d 300, 305 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 781 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 6, 1977); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Araujo*, 539 F.2d 287 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1134-1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Natale*, 526 F.2d 1160, 1173-1174 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States v. Gerry*, 515 F.2d 130 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States v. Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967). We note that Gubelman's brief cites only one case. *United States v. DeCicco*, 435 F.2d 478 (2d Cir. 1970), in which a conviction was reversed because of similar act proof.

In short, it is the law in this Court that similar act proof is admissible absent exceptional circumstances. Not only were there no exceptional circumstances in the trial below, but it is our view that this was a case in which similar act proof was unusually appropriate because of the pattern of continuous bribe-taking.

panies. This evidence was relevant to show the defendant's common scheme or plan and to rebut the claim of mistaken identity. The District Court refused to admit the similar act proof until after the Government had presented all its evidence directly supporting the charges in the Indictment and until after the Government had made an offer of proof of its similar act evidence.* (Tr. 236-237). The only objection made to the similar act proof was that the acts were too remote in time from the acts charged in the Indictment. The defendant offered no other basis for his claim that the similar act testimony should be excluded. (Tr. 238).

Gubelman's failure to object to the admissibility of this evidence on the grounds he advances for the first time on appeal constitutes a waiver of that point.** Gubel-

* In *United States v. Robinson*, 560 F.2d 507, 515-16 (2d Cir. 1977), this Court relied on the careful steps taken by the trial judge to safeguard the defendant's rights, including the fact that the disputed evidence was admitted only after all other proof in the case had been introduced and only after the trial court had heard the arguments of counsel. The *Robinson* Court also relied on the trial judge's instruction to the jury that the evidence was introduced for a limited purpose. These same steps were taken by Judge Cooper in connection with the similar act proof introduced against Gubelman. (Tr. 236-40).

** In *United States v. Braunig*, 553 F.2d 777 (2d Cir.), cert. denied, 45 U.S.L.W. 3790 (June 6, 1977), the defendant moved to suppress evidence obtained from a search made with the consent of the landlady from an apartment Braunig had rented. The defendant had argued that she had a reasonable expectation of privacy in the premises and that the warrantless search was therefore unlawful. On appeal the defendant again challenged the validity of the search, but advanced a position not pressed before the trial court. This Court found that the defendant had waived the point she was now raising on appeal:

"The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . and where that party has had ample opportunity to make the point in the trial

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man never placed the District Court on notice that he believed the similar act testimony was impermissibly prejudicial or not probative on any issue at the trial. Rather, he claimed that the similar acts were too remote in time; a claim which, under the circumstances of this case, must fail. The claim has no merit and has not even been pursued on appeal.*

Moreover, Gubelman cannot possibly claim that he lacked sufficient time to marshal all available arguments against the admissibility of the similar acts. The Government advised the defendant in advance of trial of its intention to offer the challenged evidence.** Judge Cooper gave defense counsel ample opportunity to state his reasons for opposing the introduction of this evidence. (Tr. 236-40). Gubelman should not be permitted to shift his argument and raise an objection he could readily have offered at the trial.

court in a timely manner, . . . waiver will bar raising the issue on appeal." *United States v. Braunig*, *supra*, 553 F.2d at 780.

See also *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883 (2d Cir., September 14, 1977); *United States v. Chiarizio*, 525 F.2d 289, 293-94 (2d Cir. 1975); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966); *United States v. Murphy*, 480 F.2d 256 (1st Cir. 1973).

* The similar acts occurred substantially contemporaneously with the acts charged in the indictment, all of which were part of a continuing offense by Gubelman. Similar acts need not be simultaneous with the offense charged in the indictment to be admissible. See, e.g., *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965); *United States v. Sherman*, 240 F.2d 949, 953 (2d Cir. 1957), *rev'd on other grounds*, 356 U.S. 369 (1958). The acts charged in the indictment occurred repeatedly from August 1972 through November 1973. The similar acts occurred from March through December 1973 (S.J. Schaffer) and in March and April 1974 and in May 1975 (Consolidated Beef). (GX's 9, 10, 11, 12).

** See page six of the Government's Memorandum of Law on the Admissibility of Similar Acts filed in the District Court.

The similar act proof came from Herman Lustgarten, formerly the plant manager at the S.J. Schaffer Company, and from Arnold Rosenman of Consolidated Beef, who testified that they paid money to Gubelman. The similarity between this proof and the proof involving the companies named in the Indictment is striking and shows a common and continuous bribe solicitation and payment scheme by Gubelman. Each of the four witnesses testified that while Gubelman was his federal meat inspector, Gubelman demanded money and that he took this money in cash directly from the witness, making sure that no one else was present. The amounts were similar in each instance, ranging from \$2 to \$10 a day. Significantly, Gubelman demanded and received the money on a regular basis throughout his tenure as an inspector at each of these companies.

The admissibility of evidence to show a general and continuous plan or scheme has been frequently approved.* *United States v. Birrell*, 447 F.2d 1168, 1172 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972); Rule 404(b), Federal Rules of Evidence. See also *United States v. Light*, 394 F.2d 908, 912-13 (2d Cir. 1968); *United States v. Bilotti*, 380 F.2d 649, 653 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Johnson*, 382 F.2d 280 (2d Cir. 1967).** In a case much like this

* The critical question before the District Court was whether the proof was offered solely to show the defendant's criminal character and not whether the evidence fell neatly into one of the categories enumerated in Rule 404(b). See *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973). Because the similar act proof in this case was not offered for the impermissible purpose of proving that the defendant was a bad person and because it was not inflammatory, it was properly received.

** In *United States v. Johnson*, *supra*, 382 F.2d at 281, this Court approved the introduction of evidence showing a third attempt by a defendant to steal a hand truck to prove a "pattern or scheme of systematically planned and practically identical criminal acts and in corroborating the identification of the [defendant]."

one, the First Circuit approved the use of similar act evidence in a prosecution of a federal meat inspector for bribery. *United States v. Murphy*, 480 F.2d 256, 260 (1st Cir.), *cert. denied*, 414 U.S. 912 (1973).*

The Third Circuit also has held that evidence of bribes not charged in the indictment is admissible even when intent is not disputed by the defendant. In *United States v. Laurelli*, 293 F.2d 830 (3d Cir. 1961), *cert. denied*, 368 U.S. 961 (1962), a prosecution of a defendant who had offered a government inspector \$20 every Friday for overlooking omissions in work performed under contract to the government, evidence was admitted that eleven months after the bribe offer charged in the indictment, the defendant made a similar bribe offer to another government employee. The court held that this evidence was admissible to show a pattern of similar criminal conduct. 293 F.2d at 832.** Finally,

*In his brief, Gubelman attempts to distinguish *Murphy*, referring to the First Circuit's observation that *Murphy* had not objected to the introduction of similar act proof. (Brief at 23). Although the First Circuit made this observation, it did so only after concluding that the evidence was admissible and then mentioned *Murphy's* failure to object as a secondary basis for rejecting his claim. 480 F.2d at 260.

We note that although there are no reported decisions of this Court applying 21 U.S.C. § 622, Honorable Jack B. Weinstein admitted similar act proof in two cases very similar to this one and arising from the same investigation. *United States v. Maddalena*, 76 Cr. 698, E.D.N.Y., *aff'd without opinion*, 556 F.2d 562 (2d Cir. 1977) and *United States v. Gelfand*, 76 Cr. 707, E.D.N.Y., *aff'd without opinion*, 559 F.2d 1205 (2d Cir. 1977). (This issue was raised in the *Maddalena* appeal, but not in *Gelfand*.)

**Gubelman's reliance on *United States v. DeCicca*, 435 F.2d 478 (2d Cir. 1970), involving four defendants charged with conspiracy to transport stolen paintings in interstate commerce, is misplaced. Gubelman was charged with taking a succession of bribes on a regular basis for more than fifteen months. Under these circumstances, additional evidence to establish a pattern of bribe-taking by Gubelman was highly probative. In contrast, the

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the Court of Appeals for the District of Columbia reached the same conclusion in affirming the bribery conviction of a Congressman in *United States v. Brehm*, 196 F.2d 769 (D.C. Cir.), *cert. denied*, 344 U.S. 838 (1952). The court approved the use of evidence that the defendant took money from a clerk in his office for three years in addition to the one month charged in the indictment:

"One of the established exceptions to the rule which forbids evidence of other offenses is that such evidence may be admitted to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose, or in pursuance of a single object." 196 F.2d at 771.

The similar act testimony was also relevant on the defense of mistaken identity. Gubelman suggested that meat packers Solasz and Langsam were either lying or

defendants in *DeCicco* were indicted in connection with one isolated transaction, raising no question of a pattern of conduct. Additionally, the two instances of similar act proof in *DeCicco* were quite different from the similar act evidence introduced against Gubelman. In *DeCicco* the principal Government witness on the indictment testified about one of two similar acts, the theft and sale of paintings other than those involved in the indictment. Also, an FBI agent testified that he had recovered "approximately half a million dollars in paintings, art objects, furs, and so forth, which were being fenced by [two of the defendants.]" 435 F.2d at 482. There was no evidentiary foundation for the FBI agent's conclusion that the objects had been stolen and no showing that whatever he referred to was truly similar to the offense charged in the indictment. *DeCicco* also contained a strong suggestion that, due to the lack of credibility of the Government's principal witness, this Court had doubts about the guilt of the defendants:

"In short, the defense painted a convincing portrait of a man who would do or say just about anything if he could see a profit in it." 435 F.2d at 484 n.6.

There can be no doubt about Gubelman's guilt, and Gubelman does not challenge the sufficiency of the evidence.

were mistaken in identifying him.* Under these circumstances, the jury was entitled to know that Gubelman followed a pattern of demanding money from other meat packing companies. As a matter of plain common sense the fact that the similar act witnesses identified Gubelman as an inspector to whom they gave bribes makes it more likely that Solasz and Langsam had not mistakenly identified the defendant as a bribe recipient.** *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); Rule 404(b), Federal Rules of Evidence.

Finally, the similar act proof was admitted on the issues of knowledge and intent. Although Gubelman argues that knowledge and intent were not in issue,*** he ignores authority which permits the Government to meet its burden of proving intent by establishing similar acts. *United States v. Gardin*, 382 F.2d 601, 604 (2d Cir. 1967); *United States v. Johnson*, 382 F.2d 280, 281-82 (2d Cir. 1967).

Significantly, the evidence complained of could have had no impermissible prejudicial impact. We are simply

* Gubelman first attempted to assert this mistaken identity defense in his cross-examination of Solasz and of Langsam. (Tr. 111-121, 229). In the defense case Gubelman introduced a photograph purporting to show that his appearance was substantially different at the time he was assigned to Master Purveyors and to Plaut & Stern. (DX's F and M). The defendant also offered his own copies of his time and attendance records and argued that they were inconsistent with those offered by the Government. (Tr. 322-24, DX's J and K).

** Gubelman's counsel also opened the door to proof of other bribes in his opening statement when he argued that the Government had investigated the meat industry for years but had no corroboration of its witnesses. (Tr. 20-21). Under these circumstances, it was appropriate for the Government to prove that the investigation had led to additional evidence against Gubelman.

*** Gubelman's claim that intent was not in issue is erroneous. The Government had to prove beyond a reasonable doubt that Gubelman acted knowingly and wilfully, and Judge Cooper fully instructed the jury on this issue. (Tr. 526-27).

not dealing with highly emotional evidence whose introduction could inflame a jury's passions against a defendant. This proof has none of the prejudicial impact of the "bloody shirt" evidence discussed in *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977), an appeal from a conviction for armed bank robbery. In *Robinson* this Court held that the trial judge acted within his discretion in allowing testimony that Robinson possessed a revolver at the time of his arrest ten weeks after the bank robbery. Proof of Robinson's possession of the .38 caliber revolver was found to be relevant to the charges against him, but posed the "danger of unfair prejudice." In concluding that the District Court in *Robinson* had not abused its discretion in determining that the probative value of this evidence outweighed its prejudicial impact, this Court explained the significance of evidence that has this dangerous potential to inflame the jury:

"Absent counterbalancing probative value, evidence having a strong emotional or inflammatory impact, such as a 'bloody shirt' or 'dying accusation of poisoning,' see *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. den.* 425 U.S. 958, 96 S. Ct. 1737, 48 L. Ed. 2d 202 (1976), may pose a risk of unfair prejudice because it 'tends to distract' the jury from the issues in the case and 'permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.' Advisory Committee Notes, FRE 404, quoting with approval the California Law Revision Commission. The effect in such a case might be to arouse the jury's passions to a point where they would act irrationally in reaching a verdict." 560 F.2d at 514.

There was no "inflammatory impact" in the similar act proof admitted below. It did not "tend to distract"

the jury from the issues in the case" but actually sharpened the jury's focus on those issues because of its similarity to the charges in the indictment.

Moreover, the District Court could conclude properly that a cautionary instruction would protect fully against the remote possibility that a jury would use the evidence for an improper purpose. Judge Cooper's limiting instruction with respect to the similar act evidence was more than adequate (Tr. 543); defense counsel took no exception to the charge.

In sum the District Court properly exercised its discretion in admitting the similar act as evidence. The evidence was relevant to prove identity and to establish a common scheme or plan. Moreover, Gubelman's failure to claim at trial that the evidence was irrelevant precludes him from making this claim on appeal.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Lawrence Tason being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That, on the 4th day of November
he served ~~a copy~~ ^{two copies} of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

Paul Windels, Jr., Esq.
Windels & Marx
51 West 51 Street
New York, NY
10019

An deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Lawrence Tason

Sworn to before me this

4th day of NOVEMBER, 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-15415/5
Qualified in Kings County
Commission Expires March 30, 1979

